No. 8875

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY H. WILSON, WINFRED T. WILSON and FRANCIS A. WILSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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The position of appellee in this case is summarized as follows:

1. That the property which transferor retained was not sufficient to meet the amount of debts which he owed.

2. That transferor knew when the transfer was made that the property which he retained would not be sufficient to meet his indebtedness; and therefore transferor either

(a) intended to avoid paying the income tax claims then pending; or

(b) instructed his family to whom the transfer was made to pay his taxes for him out of the money transferred. (Appellee's Brief pp. 7 and 8.)

Before pointing out specific fallacies in appellee's argument, it is pertinent to call attention generally, to what will be shown with more particularity in the reply which follows, that appellee's argument (1) disregards the established rule that the burden in this case rests on appellee; (2) disregards the issues as made by the bill of complaint; (3) disregards the evidence, and (4) disregards the findings of fact made by the Court below.

I.

In an effort to sustain the finding of fact that the transfer of the bank account rendered Henry Wilson insolvent, appellee first undertakes to ascribe to the word insolvent some meaning which would make it unnecessary for appellee to prove that the transfer left Henry Wilson without assets of sufficient value to pay the debts which he owed at the time.

It is really of no importance in this case how the term "insolvent" is defined. Whether it means insufficiency of one's property to pay his debts, or whether it means inability to pay debts as they become due in the ordinary course of business, really depends in the last analysis on the relation of assets to liabilities. Obviously if a man has $10,000 worth of property which is salable, and owes only $5000, he not only has property sufficient to pay his debts, but he has the ability to pay them in the ordinary course of business, if he is willing to sell when necessity requires the conversion into cash. The California rule has been clearly stated in *Sacry v. Lobree,* 84 Cal. 41:

> "A debtor is not insolvent, within the meaning of the insolvent law of this state, if he has sufficient means or resources of any kind to enable him to pay all of his debts as they become due in the ordinary course of business, though he may not have sufficient money in hand or in bank to meet them, or to pay a particular debt in money when due;"

It must be borne in mind, however, that appellee is limited to the allegations of fact contained in its own bill of complaint, and to the findings responsive to those allegations. The only allegation of fact in the complaint, so far as the transfer is concerned, is that on the 1st of June, 1928, Henry Wilson voluntarily, without consideration, transferred to the defendants *all* of the property then owned by him (Record p. 5), and that the transfer left the said Henry Wilson insolvent, and without property out of which the taxes could be collected. (Record pp. 5 and 6.) The only finding of fact responsive to this issue as made by the bill of complaint is in Finding of Fact No. 4 and is that "the sum total of the debts of said Henry Wilson at the time of his transfer of said bank account exceeded the fair market value of his interest as joint tenant in said residence". (Record pp. 25 and 26.)

The word "insolvency" does not appear in the findings of fact at all, and the only question to be answered here is how much did Henry Wilson owe at the date of the transfer and what was the value of what he had left after he made it.

In the opening brief the actual indebtedness of Henry Wilson at the date of the transfer was stated

at $20,160.76. This was the amount found by the Court, making allowance for an item of interest which is made inevitable as a simple matter of arithmetical calculation, from the figures which appear in the findings. It appears in the findings that the deficiencies for the years 1918 and 1919, as determined by the Board of Tax Appeals included interest as of November 6, 1928. As it is a matter of law that deficiencies bear interest at the rate of six per cent per annum, obviously the figure given in the Court's findings includes interest at the rate of six per cent per annum on the amount of the deficiencies from June 1, 1928 (date of transfer) to November 6, 1928. As a matter of arithmetic this is $143.30. Appellee, of course, made two errors in the footnote at the bottom of page 16 of appellee's brief. The first error is in stating that the deduction was made from the amount of the taxes due for 1921 to 1924, because the deduction was made only for interest due on the 1918 and 1919 taxes. The second error is in stating that it was interest from June 1, 1928, date of the transfer, to June 5, 1928, the date of transferor's death.

In a further effort to increase the amount of Henry Wilson's indebtedness at the date of the transfer, appellee argues that the amount of Henry Wilson's indebtedness ought to be increased so as to include an amount which the Commissioner of Internal Revenue was trying to collect, but which the Board of Tax Appeals found was not due. It is rather naive to ask that in the computation of a man's indebtedness at a given time there be included a sum which a competent tribunal having jurisdiction in the premises found

that he did not owe at that time, or ever. Moreover, appellee is in no position to challenge the finding of fact in this reference and substitute one of its own.

Again, in an effort to increase the amount of the transferor's indebtedness, appellee refers to taxes on real estate, amounting to the sum of $1300, which became due not only after the date of the transfer, but after the death of the transferor. Here again the answer is twofold. First, that the evidence shows that these taxes at the time of the transfer were not due; and second, the findings in the Court below are to the contrary.

The amount of the indebtedness at the date of the transfer, both as shown by the evidence and as found by the lower Court, was actually as stated, $20,160.76. As against this, what did Henry Wilson have to enable him to pay this sum? The Court found that he had property located in Piedmont which he held in joint tenancy with his wife, and that the fair market value of this property was $45,000. The undisputed evidence shows that this property was acquired with community funds, and that, in addition to this property, Henry Wilson had a drawing account of $12,000 per annum. But disregarding the drawing account and adopting the theory that under the law of California only one-half of the real property was subject to the payment of Henry Wilson's debts, appellee attempts to read into both evidence and findings a speculation of its own that Henry Wilson could not have realized out of his interest in the property enough to pay his debts. The whole argument in this

reference is based, not on what the evidence shows or even on what the Court found, but on what appellee now thinks. The argument of appellee is that a half interest in the property could not have been sold for a figure equal to one-half of the whole. There is some claim, too, that perhaps the fair market value of the property is not the test; but a forced sale value is the correct test. Even if we turn away from the mathematical axiom heretofore generally followed that one-half of a whole is one-half, appellee's *speculation* as to the value of a half interest in the property leaves it short of having successfully shouldered the burden, which rested upon appellee, of establishing insolvency. No effort was made by appellee to show what could have been realized, for example, on a forced sale of Henry Wilson's interest, nor was any evidence introduced by appellee or otherwise to show how much less than a half of the whole value a half interest in the property was worth.* The burden of establishing the value of Henry Wilson's interest in the property, if it can be said that this value was anything other than a half of the value of the whole, rested squarely on the appellee and appellee has not questioned the soundness of this rule as supported by authorities cited in the opening brief. (p. 17.)

But, as pointed out in the opening brief, under the law of California (which it is now conceded applies here), all of the property was subject to the payment

*It is conceivable that an undivided half interest in property, for trading purposes, might be worth more than one-half of the value of the whole, particularly in a situation such as that shown by the evidence here. At all events, the speculation may be indulged in just as readily as one that it was worth less.

of Henry Wilson's debts at the date of the transfer and not one-half. None of the cases cited by appellee overrules *Hulse v. Lawson,* 212 Cal. 614. Indeed, as pointed out in appellant's opening brief, the case of *Siberell v. Siberell,* 214 Cal. 767, cited at some length in appellee's brief (pp. 13 and 16) is at pains to announce that the rule laid down in *Hulse v. Lawson* is not disturbed, and to clearly mark the distinction in cases where the question arises as against creditors or third parties. Appellee's effort to distinguish the case here from *Hulse v. Lawson* fails utterly when the language of the opinion, and not appellee's misquotation of it, is examined. Appellee says the "court found there that the property was not held in joint tenancy". (Appellee's Brief p. 14.) There is no such language in the opinion. The facts of that case are (pp. 618, 619, 620) that the property in question had been originally conveyed to a man and his wife as joint tenants. The purchase price was paid out of community earnings. Subsequently while indebted in a considerable sum the husband conveyed all of the property to his wife. The creditor brought suit against the husband and obtained judgment for the amount of the debt. An execution having been returned unsatisfied the creditor thereupon brought suit to set aside the conveyance from husband to wife, and to have the whole of the property (not the husband's half) subjected to the payment of the judgment. Notwithstanding the joint tenancy, the creditor's right was upheld, the Court holding that the property continued to be community property and

that the judgment subjecting the whole of it to the payment of the debt should be affirmed. If, as now claimed by appellee, because there was a joint tenancy only half of the property could be subjected to the payment of the husband's debt, *Hulse v. Lawson* could not have been decided as it was; and as *Hulse v. Lawson* has never been reversed, but on the contrary in *Siberell v. Siberell,* the principle that property held by husband and wife as joint tenants purchased with community funds is liable for the husband's debts, was reaffirmed, and as it is the law of California, it is the principle which applies here. And of course if the entire property was subject to the payment of Henry Wilson's debts, appellee's whole argument is swept away.

Then, too, appellee's argument that the $12,000 drawing account of Henry Wilson may be disregarded, does not hold up. The uncontradicted evidence is:

> "He never actually retired and was always interested in business, an active partner *to the time of his death,* more or less. He was not interested in the lumber business at the time of his death except in so far as he acted as a sort of adviser for Wilson Bros. and Company and drew a salary from the Company." (Record pp. 61, 62.) (Italics ours.)

> "My father acted in an advisory capacity for Wilson Bros. Company and had a drawing account for his services. For 1927 the drawing account was $12,000.00. It had not been fixed in 1928, but he *did* have a drawing account of $12,000 a year." (Record p. 74.) (Italics ours.)

Appellee contends that it was not property which could be assigned for the benefit of creditors and therefore was properly ignored. Just why this account could not be assigned is not explained. But certainly a drawing account of $12,000 a year is something that a man could use in paying his debts, and therefore cannot be disregarded in the determination of the debtor's financial condition.

II.

The argument that Henry Wilson knew when the money was transferred that the property which he had retained would not be sufficient to meet the demands which would be made on him, and therefore he intended to avoid paying the income tax claims which were then pending, or instructed his family to whom the transfer of money was made to pay his taxes for him out of such money, may be readily disposed of. The first part of this argument, rephrased, is necessarily either that there was an actual intent to defraud on the part of the transferor, or that the transferor contemplated insolvency when he made the transfer. It is of course true that if at the time of the transfer there was an actual intent on the part of the transferor to hinder, delay or defraud his creditors, the transfer would be invalid as against creditors. But no such actual intent to hinder, delay or defraud creditors was charged in the bill; it was not asserted in appellee's opening statement in the Court below; there is not one item of evidence to

support such an allegation; nor is there any finding of fact in this respect. All of the authorities cited clearly hold that where the vice of a transfer is an intent to defraud creditors under Section 3439 (and not constructive fraud under Section 3440) of the Civil Code of the State of California, fraudulent intent is a question of fact which must be alleged and proven. As it was not alleged in the bill of complaint, not claimed to be the fact in the Court below, not proven to be a fact and not found as a fact, this phase of the question is eliminated.

What *does* the record show as to the issues, evidence and findings bearing on the claim that the transfer was made in contemplation of insolvency? The bill of complaint, as has been pointed out above, is bare of any such allegation because the only allegation in the bill is that the transferor transferred *all* of his property, and so was left without any property out of which the particular tax sued for could be paid. Neither was there any claim made by appellee in the Court below that the transfer was made in contemplation of insolvency. The opening statement charges neither actual fraud nor contemplation of insolvency. (Record pp. 39 to 43.) It is said in the opening statement, as well as in the findings, that the transfer was made in "contemplation of death". But there is a vast difference between a transfer made in "contemplation of death", and a transfer made "in contemplation of insolvency". That the transfer was made in "contemplation of death" is a fact that is utterly irrelevant here, because "contemplation of death" is something that is important only in the

determination of the extent of an estate taxable under inheritance tax laws, and the phrase has no part whatever in the determination of the validity or invalidity of a transfer by reason of the insolvency of the transferor or his contemplation of insolvency. So, too, there is no *finding of fact* that the transferor contemplated insolvency, nor is there any finding of fact from which such an inference may be drawn. It is significant that the Court below not only did not find as a fact that the transfer was made in contemplation of insolvency, or find any facts from which such an inference would necessarily follow, but it did not even conclude as a matter of law from the facts found that the transfer was made in contemplation of insolvency; but merely that it rendered the transferor insolvent. Nor would the evidence sustain any such finding of fact, even though it can be said to sustain the irrelevant finding that the transfer was made "in contemplation of death".*

It may be added that the references to the evidence in the case on pages 11 and 18 of appellee's brief are not borne out by the record. There was no evidence that at the time of the transfer, Henry Wilson was known to be on his deathbed. The record shows that at the time of the transfer neither Henry Wilson, his family, nor his doctor, considered that death was imminent. (Record pp. 57, 65, 66, 68, 70.) While perhaps it is not important to this discussion, the finding that the transfer was made in the privacy of Henry Wilson's own home has no support in the evidence,

*The phrase "contemplation of insolvency" appears nowhere in the record.

which is to the effect that the transfer was made at the San Francisco Bank. (Record pp. 68, 69.) Then too, it must be borne in mind that Henry Wilson was contesting these particular taxes, and therefore the natural inference is, not that he was contemplating insolvency, but that his mental attitude was that he owed no additional taxes whatever. And finally it is interesting to note, and perhaps it might be said to be really conclusive of the argument, that appellee itself states "Mr. Wilson had a reputation during his lifetime of honesty and he was in the habit of paying bills regularly. From this one might infer that he intended to pay the claim involved here * * *" (Appellee's Brief p. 19.)

There is left only the statement of appellee's alternative argument that Henry Wilson "instructed his family to whom the transfer was made to pay his taxes out of such money". Here, again, we are confronted with the absence in the bill of complaint of any allegations which would entitle appellee to relief on such a theory. The bill was framed on the theory of fraud as against the Government, not on the existence of an agreement creating a trust in aid of the Government. Appellee's application in the Court below to amend the bill so as to set up an express trust resting on an agreement was not granted by the Court below. It was not acted upon at all. There is no finding of any such agreement, nor could there have been in the light of the evidence, which is undisputed that there was no such agreement or understanding. (Record p. 70.)

CONCLUSION.

Summarized, the situation, then, is this. There is no allegation in the bill that the transferor ever instructed the transferees to pay his taxes or any other debt. Nor is there any allegation in the bill to support the theory of an express trust. There is no finding of fact to support such a theory, and the undisputed evidence is to the contrary.

There is no allegation in the bill that the transfer was made in contemplation of insolvency. The evidence shows that the transferor did not expect to die at the time of the transfer, that he did not admit owing the taxes sought to be collected, but was contesting their payment; and that after the transfer he was left with property, in addition to a drawing account of $12,000 a year, having a fair value in excess of the amount of all of his debts, whether all or half of the Piedmont property could be subjected to the payment of such debts, although under the applicable California law, the whole of the Piedmont property was available for the payment of debts.

In concluding it may be said that the transfer attacked in this suit did not leave Henry Wilson, as alleged in the bill, "without assets or property out of which plaintiff or its agents, or collectors could collect said taxes under ordinary available remedies". (Record p. 7.) The Government was not left without a remedy, even when the joint tenancy terminated (although this, according to the evidence, was fortuitous and not expected) because the transferor

happened to die four days after the transfer was made. But the Government's remedy was not the one which it sought in this suit.

Dated, San Francisco,
September 26, 1938.

Respectfully submitted,

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